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Nos. 07-588, 07-589 and 07-597

In the Supreme Court of the United States

ENTERGY CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

PSEG FOSSIL LLC, ET AL., PETITIONERS

v.

RIVERKEEPER INC., ET AL.

UTILITY WATER ACT GROUP, PETITIONER

v.

RIVERKEEPER INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 316(b) of the Clean Water Act, 33 U.S.C. 1326(b), authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the "best technology available for minimizing adverse environmental impact" at cooling water intake structures.

2. Whether Section 316(b) prohibits the use of restoration measures as a means of minimizing the adverse environmental impact associated with cooling water intake structures.

3. Whether Section 316(b) authorizes EPA to regulate cooling water intake structures at existing facilities, as well as at new facilities.

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OPINION BELOW

The opinion of the court of appeals (07-589 Pet. App. 1a-86a) is reported at 475 F.3d 83.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2007. A petition for rehearing was denied on July 5, 2007 (07-589 Pet. App. 87a-89a). On September 25, 2007, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including November 2, 2007, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Steam electric power plants and other industrial and manufacturing facilities employ cooling water intake structures (intake structures) to absorb heat. The intake structures at such plants collectively withdraw large amounts of water each day from the Nation's lakes, rivers, and other water bodies. Among the adverse environmental impacts that occur as those structures withdraw water are "impingement," which occurs when aquatic organisms are trapped against the intake structures by the force of the inflowing water, and "entrainment," which occurs when smaller organisms are pulled into a facility's cooling system. See 07-589 Pet. App. 2a.

Section 316(b) of the Clean Water Act (CWA or the Act) requires that "[a]ny standard established pursuant to" Section 301 or 306 of the Act "and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. 1326(b). That provision is unique among CWA provisions in that it addresses the *intake* of water, in contrast to other

provisions that regulate the *discharge* of pollutants into waters of the United States.

The CWA does not define the substantive standard specified in Section 316(b)—"best technology available for minimizing adverse environmental impact" (BTA). 33 U.S.C. 1326(b). Section 316(b) does, however, cross-reference Sections 301 and 306 of the CWA by requiring that any standards established pursuant to those sections also require that intake structures reflect the BTA. *Ibid.* Section 301 authorizes the Environmental Protection Agency (EPA) to establish, among other things, effluent limitations based on the "best practicable control technology currently available" (BPT) or the "best available technology economically achievable" (BAT). 33 U.S.C. 1311(b)(1)(A) and (2)(A). Section 306 directs EPA to establish performance standards based on the "best available demonstrated control technology" (BADT). 33 U.S.C. 1316(a)(1).

The CWA specifies that, in establishing BPT, EPA must consider, among other factors, "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application * * * and such other factors as the Administrator deems appropriate." 33 U.S.C. 1314(b)(1)(B). In determining BAT, EPA may consider factors similar to the BPT factors, including "the cost of achieving such effluent reduction * * * and such other factors as the Administrator deems appropriate." 33 U.S.C. 1314(b)(2)(B). The limitations and standards promulgated under Sections 301, 306, and 316(b) are implemented through National Pollutant Discharge Elimination System (NPDES) permits, which are issued for terms of up to five years, either by States with approved NPDES programs or, in States without an ap-

proved NPDES program, by EPA. See 33 U.S.C. 1342; 40 C.F.R. 125.90(a).

2. a. EPA first promulgated regulations implementing Section 316(b) in 1976. 41 Fed. Reg. 17,387. The Fourth Circuit remanded those regulations to EPA for procedural reasons. *Appalachian Power Co.* v. *Train*, 566 F.2d 451 (1977). When EPA subsequently withdrew the remanded regulations, it left intact a separate provision, which had not been remanded, that directs permitting authorities to use their best professional judgment to determine the BTA for each facility on a case-by-case basis. See 44 Fed. Reg. 32,854, 32,956 (1979); 40 C.F.R. 401.14. In 1977, EPA also issued a General Counsel opinion confirming its previous interpretation that, while Section 316(b) does not require a full cost-benefit analysis, it would be unreasonable "to interpret Section 316(b) as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained." *In re Central Hudson Gas & Elec. Corp.*, Op. EPA Gen. Counsel, NPDES No. 63, 1977 WL 28250, at *8 (July 29, 1977) (citation omitted). Thus, for more than 30 years, permitting authorities have considered costs and benefits to at least that extent in determining a facility's BTA.

b. In 1995, EPA entered into a consent decree establishing deadlines for proposing and taking final action on regulations implementing Section 316(b). That consent decree was later amended to provide for three phases of rulemaking addressing different categories of facilities. See 07-589 Pet. App. 4a-5a.

EPA published a Phase I rule in 2001. 66 Fed. Reg. 65,256. That rule governs new facilities that meet certain threshold specifications, and it provides that closed-cycle cooling technology (which reuses withdrawn wa-

ter) is generally the BTA for such facilities. *Id.* at 65,270-65,271. The Second Circuit largely upheld the Phase I rule. *Riverkeeper, Inc.* v. *United States EPA*, 358 F.3d 174, 181 (2004). The Phase II rule, which is at issue here, establishes requirements for intake structures at large, existing power plants that meet certain threshold specifications. 69 Fed. Reg. 41,576 (2004). The Phase III Rule, which governs new offshore and coastal oil and gas facilities and existing manufacturing and industrial facilities and smaller power plants, see 71 Fed. Reg. 35,006 (2006), is pending review in the Fifth Circuit. *ConocoPhillips Co.* v. *EPA*, No. 06-60662 (filed July 14, 2006).

In the Phase II rule at issue here, EPA selected a suite of technologies to reflect the BTA. 69 Fed. Reg. at 41,598-41,599. Those technologies include, among others, relocation of intakes, fine mesh passive screens, double-entry single exit traveling screens, velocity caps, larger intakes to decrease intake velocity, and barrier nets. See *id.* at 41,599. Based on that suite of technologies, EPA adopted national performance standards for reducing impingement mortality by 80%-95% and entrainment by 60%-90%. 40 C.F.R. 125.94(b). Facilities may use any combination of control technologies or operational controls, including restoration measures, to meet those standards. 40 C.F.R. 125.94(a)(1)-(4). A facility may request a variance that results in a site-specific BTA determination if the facility demonstrates that the cost of complying with the national performance standards is significantly greater than the benefits of compliance. 40 C.F.R. 125.94(a)(5).

EPA considered treating closed-cycle recirculating cooling towers, which it had determined to be the BTA for (new) Phase I facilities, as the BTA for (existing)

Phase II facilities. See 69 Fed. Reg. at 41,605-41,606. EPA rejected that alternative, however, because of its "generally high costs (due to conversions), the fact that other technologies approach the performance of this option, concerns for energy impacts due to retrofitting existing facilities, and other considerations." *Id.* at 41,605. EPA explained that: the cost of closed-cycle recirculating cooling towers for Phase II facilities was many times higher than for Phase I facilities (at least $130-$200 million per tower, and probably more than that, with additional annual operating costs up to $20 million per facility); such cooling towers were less energy efficient than EPA's chosen alternatives; and, "[a]lthough not identical, the ranges of impingement and entrainment reduction are similar" under EPA's chosen option and the closed-cycle alternative. *Id.* at 41,605, 41,606.

3. After several parties petitioned for review, the petitions were consolidated in the Second Circuit. See 07-589 Pet. App. 1a-86a. As relevant here, the court of appeals held that: (i) EPA may not consider the relationship between an alternative's costs and benefits in determining the BTA, *id.* at 17a-33a; (ii) Section 316(b) precludes the use of restoration measures as a means of minimizing adverse environmental impacts, *id.* at 40a-45a; and (iii) EPA may apply Section 316(b)'s requirements to both new and existing facilities through the NPDES permit process, *id.* at 65a-70a.

a. The court of appeals recognized that "Section 316(b) does not itself set forth * * * the specific factors that the EPA must consider in determining BTA." 07-589 Pet. App. 18a. Because Section 316(b) cross-references Sections 301 and 306, however, the court looked to the factors that EPA may consider in implementing

various standards under those sections. *Id.* at 18a-20a. While those standards treat costs in different ways, including by requiring cost-benefit analysis in some circumstances, the court concluded that Congress had manifested a clear intent in those other provisions "to move cost considerations under the CWA from a cost-benefit analysis to a cost-effectiveness one." *Id.* at 20a. The court further asserted that, if Congress had intended to permit a comparison of costs and benefits, it would have said so expressly in the statute. *Id.* at 22a-23a.

The court of appeals then held that EPA may not engage in cost-benefit analysis, but instead "may permissibly consider cost in two ways: (1) to determine what technology can be 'reasonably borne' by the industry and (2) to engage in cost-effectiveness analysis." 07-589 Pet. App. 23a. After consulting the definition of "cost-effectiveness" found in an Office of Management and Budget (OMB) circular, the court explained that, in its view, permissible cost-effectiveness review is limited to choosing "a less expensive technology that achieves essentially the same results" as the best technology that industry can reasonably bear. *Id.* at 20a n.10, 23a-24a. "For example, assuming the EPA has determined that power plants governed by the Phase II Rule can reasonably bear the price of technology that saves between 100-105 fish, the EPA, given a choice between a technology that costs $100 to save 99-101 fish and one that costs $150 to save 100-103 fish * * * could appropriately choose the cheaper technology on cost-effectiveness grounds." *Id.* at 24a. Thus, the court concluded, "the specified level of benefit is * * * a narrowly bounded range, within which the EPA may permissibly choose between two (or more) technologies that produce essen-

tially the same benefits but have markedly different costs." *Id.* at 25a.

The court of appeals then remanded to EPA because, in the court's view, "it is unclear whether the Agency improperly weighed the benefits and the costs of requiring closed-cycle cooling." 07-589 Pet. App. 29a. Based in part on its cost-benefit holding, the court also invalidated the provision of the Phase II rule that authorized site-specific variances based on a comparison of costs and benefits at particular sites. *Id.* at 52a.

b. The court of appeals went on to hold that Section 316(b) unambiguously precludes EPA from considering restoration measures, such as restocking of fish and improvement of surrounding habitat, in determining the BTA for a facility. 07-589 Pet. App. 40a-45a. In limited circumstances, EPA had allowed facilities to use such measures to offset the adverse environmental impacts that would otherwise be caused by the operation of an intake structure. 40 C.F.R. 125.94(c). In the court of appeals' view, however, such mitigation measures do not "minimize" adverse environmental impacts within the meaning of Section 316(b), but instead "substitute after-the-fact compensation for adverse environmental impacts that have already occurred." 07-589 Pet. App. 44a.

c. The court of appeals also upheld EPA's determination that Section 316(b) applies to existing as well as new facilities. 07-589 Pet. App. 65a-70a. The court explained that "[S]ection 316(b), on its face, applies to existing facilities" because it cross-references Section 301, which applies to existing facilities. *Id.* at 68a. "At the very least," the court concluded, "EPA's view that section 316(b) applies to existing facilities is a reasonable interpretation of the statute." *Ibid.*

In so holding, the court of appeals rejected the contention that EPA could not use the NPDES permitting process to enforce Section 316(b)'s requirements against existing facilities. 07-589 Pet. App. 68a-70a. The court noted that EPA must enforce Section 316(b) against existing facilities through "some permit process," and NPDES permits are "used to enforce the effluent limitations of sections 301 and 306." *Id.* at 69a. Thus, the court held, "EPA's decision to use the NPDES process to enforce section 316(b) is not unreasonable." *Ibid.*

ARGUMENT

1. Petitioners contend (*e.g.*, 07-589 Pet. 17-27) that the court of appeals erred in holding that, in determining the BTA, EPA may not consider the relationship between a technology's costs and benefits. The government agrees. The court of appeals' holding to that effect is wrong, and is in tension with *Seacoast Anti-Pollution League* v. *Costle*, 597 F.2d 306 (1st Cir. 1979). There is, however, no square circuit conflict on that question. And, while the question presented has great significance, it is not yet clear whether the decision is sufficiently important to merit the Court's review.

To be sure, the uncertainty created by the erroneous decision below may have significant repercussions for facilities that undergo permitting decisions before the remand proceedings are completed. In the government's view, however, the full impact of the decision will not be clear until EPA completes proceedings on remand. For that reason, the government decided not to file a petition for a writ of certiorari in this case. If this Court were to grant the petitions, however, the government would support the position of the petitioners on this issue.

a. The court of appeals' holding that Section 316(b) unambiguously precludes comparison of a technology's costs and benefits is incorrect. Section 316(b) requires EPA to select the "best technology available for minimizing adverse environmental impact." 33 U.S.C. 1326(b). As the court of appeals recognized, "Section 316(b) does not itself set forth * * * the specific factors that the EPA must consider in determining BTA." 07-589 Pet. App. 18a.

Nor does anything in the general statutory phrase preclude EPA's conclusion that the statute permits consideration of cost-benefit analysis in determining the BTA. The "best" technology for minimizing adverse impacts is not necessarily the one that provides the greatest reduction of such impacts, without regard to any other considerations. Section 316(b) cross-references Sections 301 and 306 of the Act, which direct EPA to adopt various other "best" standards: the "best practicable control technology currently available" (BPT); the "best available technology economically achievable" (BAT); and the "best available demonstrated control technology" (BADT). See 33 U.S.C. 1311(b)(1)(A) and (2)(A), 1316(a)(1), 1326(b). Congress specified that, in establishing BPT, EPA must consider, among other factors, "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application * * * and such other factors as the Administrator deems appropriate." 33 U.S.C. 1314(b)(1)(B). In determining BAT, EPA is not *required* to consider the relationship between costs and benefits, but Congress expressly provided that the agency may consider "the cost of achieving such effluent reduction * * * and such other factors as the Administrator deems appropriate." 33 U.S.C. 1314(b)(2)(B).

Those statutory provisions confirm that "the CWA's requirement that EPA choose the 'best' technology does not mean that the chosen technology must be the best [at] pollutant removal." *Citizens Coal Council* v. *United States EPA*, 447 F.3d 879, 903 (6th Cir. 2006) (en banc) (quoting *BP Exploration & Oil, Inc.* v. *United States EPA*, 66 F.3d 784, 796 (6th Cir. 1995)).[1]

The court of appeals asserted that, if Congress had intended to permit consideration of the relationship between costs and benefits, it would have clearly said so. 07-589 Pet. App. 22a-23a. By treating statutory silence as an unambiguous prohibition, the court turned normal rules of statutory construction and *Chevron* deference on their head. "[S]uch silence, after all, normally creates ambiguity. It does not resolve it." *Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002); see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). Moreover, the court of appeals erred in construing *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 510 (1981), to erect a presumption against consideration of the relationship between costs and benefits. See 07-589 Pet. App. 22a-23a. *Donovan* upheld an agency's determination that it was not *required* to undertake cost-benefit analysis under a different statute. *Donovan*, 452 U.S. at 506. Thus, *Donovan*—which predated

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[1] The court of appeals asserted that BTA is more akin to BAT than BPT, and construed BAT (unlike BPT) to preclude cost-benefit analysis. 07-589 Pet. App. 18a-20a. All three standards, however, include the terms "best," "technology," and "available," and neither the BAT nor the BPT standard goes on to consider minimizing adverse environmental impacts. See 33 U.S.C. 1311(b)(1)(A) and (2)(A), 1326(b). As such, the court of appeals erred in concluding that the Act unambiguously treats BTA like BAT (but not BPT) for this purpose.

Chevron in any event—did not hold that silence unambiguously *precludes* consideration of costs and benefits.

More recent decisions applying *Chevron* principles of statutory construction have construed congressional silence as permitting cost-benefit analysis. See, *e.g.*, *Sierra Club* v. *United States EPA*, 314 F.3d 735, 744 (5th Cir. 2002); *Michigan* v. *United States EPA*, 213 F.3d 663, 678-679 (D.C. Cir. 2000), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001). The District of Columbia Circuit, for example, has explained that "[i]t is only where there is clear congressional intent to preclude consideration of cost that we find agencies barred from considering costs." *Id.* at 678 (internal quotation marks and citation omitted). The court of appeals erred by relying on the opposite presumption in this case.

The court of appeals confirmed its error by purporting to micro-manage the agency's decisionmaking by establishing rules that cannot be found anywhere in the Act. The court concluded, for example, that EPA may consider costs as part of cost-effectiveness but not cost-benefit analysis—terms that appear nowhere in the statute. After consulting the definition of "cost-effectiveness" found in an OMB circular that does not purport to interpret Section 316(b), the court proclaimed that EPA could adopt a significantly cheaper technology that would save 99-101 fish instead of 100-103 fish. 07-589 Pet. App. 20a & n.10, 24a. While it is not clear what result the court of appeals would reach if five or ten fish were potentially affected instead of one or two, the point for present purposes is that the court of appeals' freelancing violates *Chevron* by usurping the agency's role of construing and filling in an ambiguous statute.

Indeed, the court of appeals also agreed to let EPA consider other practical factors, such as energy effi-

ciency and countervailing environmental effects. 07-589 Pet. App. 24a n.12. While those factors are very important considerations, the lines drawn by the court of appeals between what it will and will not permit the agency to consider are by no means required by the statute; instead, they are simply the court of appeals' preferences imposed on the agency, in violation of *Chevron*.

b. The court of appeals' decision is also in tension with the First Circuit's decision in *Seacoast*, *supra*. In determining the BTA in that case under Section 316(b), EPA rejected an alternative that would have further minimized entrainment "only slightly," and would have cost an additional $20 million. *Seacoast*, 597 F.2d at 311. EPA rejected that alternative because "the costs would be 'wholly disproportionate to any environmental benefit.'" *Ibid.* (quoting EPA's opinion). After resolving a factual dispute concerning the magnitude of the costs, the First Circuit stated that "[p]etitioners, wisely, do not argue that the cost may not be considered." *Ibid.* Rather, "[t]he legislative history clearly makes cost an acceptable consideration in determining whether the intake design 'reflect[s] the best technology available.'" *Ibid.* (quoting Staff of the Senate Comm. on Public Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 264 (Comm. Print 1973)).

Seacoast does not present a square conflict for two reasons. First, it appears from the court of appeals' brief discussion that the permissibility of considering costs was not in dispute in that case. 597 F.2d at 311. Second, while the First Circuit clearly stated that EPA may consider costs, the court did not explicitly discuss the *extent* to which costs may be considered. See *ibid.*

Nonetheless, *Seacoast* upheld EPA's rejection of an alternative on the ground that its costs were wholly disproportionate to its benefits—a legal standard that cannot be squared with the court of appeals' decision below. Indeed, the court of appeals below faulted EPA for applying a standard that, in the court of appeals' view, resembled one that looks to whether costs are "wholly out of proportion" to benefits. 07-589 Pet. App. 19a (quoting *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 71 n.10 (1980)). In this case, therefore, the court of appeals rejected essentially the same legal standard that EPA had applied in *Seacoast*.

c. While the court of appeals' decision is undoubtedly important, and it unjustifiably constrains EPA's consideration of costs and benefits, it is unclear how significant the decision ultimately will prove to be. The court of appeals did not determine that EPA had considered costs in an unlawful fashion; instead, it found EPA's rationale "unclear" and remanded for further proceedings. 07-589 Pet. App. 26a. In doing so, the court of appeals noted that EPA could permissibly consider the energy impacts, countervailing environmental effects, and cost-effectiveness of alternatives. *Id.* at 24a n.12.

Nonetheless, it is clear that the court of appeals' decision will be disruptive. The Phase II rule affects approximately 550 facilities that account for approximately 40% of our Nation's energy production. See 69 Fed. Reg. at 41,608; Office of Water, EPA, *Economic and Benefits Analysis for the Final Section 316(b) Phase II Existing Facilities Rule* A3-6, A3-13 (2004). Because those facilities' NPDES permits expire every five years, see 33 U.S.C. 1342(a)(3) and (b)(1)(B), many affected permitting decisions may be made before EPA com-

pletes the remand proceedings and an appellate court reviews those proceedings. Until EPA completes the remand proceedings, permitting authorities will issue permits on a case-by-case basis based on their best professional judgment. At least in the Second Circuit, however, they will no longer be able to consider the relationship between costs and benefits. That will mark a sharp break from past practice, because EPA and other permitting authorities have understood for at least 30 years that cost-benefit analysis is an appropriate consideration. See, *e.g.*, *Central Hudson*, Op. EPA Gen. Counsel, NPDES No. 63, 1977 WL 28250, at *8 (explaining that it would be "unreasonable to interpret Section 316(b) as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained") (citation omitted). The short-term consequences of the resulting uncertainty will be magnified by the fact that existing facilities have made enormous investments based, in part, on their reliance on past permitting decisions made under a different legal standard.

As EPA determined in the Phase II rulemaking, any requirement that existing facilities must adopt closed-cycle cooling technology would have dramatic effects. Nationwide, the cost would exceed $3.5 billion annually, and possibly be much more than that. 69 Fed. Reg. at 41,605. Such controls would also impose a significant "energy penalty" by reducing the amount of energy created by affected plants while forcing others to remain idle during extensive retrofits (or to close their doors forever). See *ibid.* At this time, however, any assessment of the likely consequences is speculative, as explained above.

It is also unclear whether the court of appeals' decision will have practical consequences beyond the

Phase II rule. EPA's Phase III rule expressly relies on cost-benefit considerations. *E.g.*, 71 Fed. Reg. at 35,015. Challenges to that rule are currently pending before the Fifth Circuit, and the United States is defending EPA's consideration of the relationship between costs and benefits in that rulemaking. See U.S. Br. at 54-73, *ConocoPhillips*, *supra* (No. 06-60662). If the Fifth Circuit were to agree with the Second Circuit, the practical importance of the question would be magnified. If the Fifth Circuit were to disagree with the Second Circuit, the resulting circuit conflict would also weigh in favor of this Court's review. At this juncture, however, it is not clear that the consequences of the court of appeals' ruling below are sufficiently important to satisfy this Court's certiorari criteria.

2. In addition to challenging the court of appeals' erroneous cost-benefit holding, petitioners argue (*e.g.*, 07-589 Pet. 28-31) that the court of appeals erred in holding that the CWA precludes the use of restoration measures to minimize the adverse environmental impacts of cooling water intake structures. While the court of appeals' holding on that issue is wrong as well, it does not warrant further review at this time.

As discussed, the statute requires that "the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. 1326(b). EPA's regulations permit the use of restoration measures (instead of, for example, improvements to the equipment used in intake structures) when, among other things, "the impacts to fish and shellfish * * * within the watershed [through the use of restoration measures] will be comparable to those which would result" from other compliance methods. 40 C.F.R. 125.84(d)(1). That

is a reasonable interpretation of the statutory text, because it provides a common sense way of minimizing environmental impacts in a cost-effective manner.

The court of appeals construed Section 316(b) to require that BTA be implemented through "the location, design, construction, or capacity of cooling water intake structures." 07-589 Pet. App. 44a. Restoration measures are, however, part of the overall "design" of such structures. In any event, the statute requires only that the design "reflect[]" BTA, and the design does so when restoration measures help the facility achieve that level of protection. The court of appeals also thought that "minimizing adverse environmental impact" under the statute unambiguously requires minimizing that impact before any consequence occurs, as opposed to using restoration measures to replace, for example, entrained organisms with new organisms. 07-589 Pet. App. 44a. But nothing in the statute requires minimization to take either form, so long as the end result is comparable. Thus, if the Court were to grant the petitions, the government would support the position of the petitioners on this issue as well.

The restoration-measures question does not, however, warrant further review at this time. No other court of appeals has held that restoration measures are a permissible means of compliance under Section 316(b). While the court of appeals' decision has the potential to be disruptive and to require inefficient and wasteful results at existing facilities that had intended to rely upon restoration measures, the issue is not so exceptionally important as to warrant review in the absence of a circuit conflict. The court of appeals' holding is limited to Section 316(b), and does not extend to the use of restoration measures under other provisions of the CWA or

other environmental statutes. Moreover, the permissibility of restoration measures lacks the far-reaching significance of the more fundamental cost-benefit question described above, because such measures are simply one means of complying with BTA once BTA is established.

3. Alone among the petitioners, Entergy also argues (07-588 Pet. 15-25) that the court of appeals erred in upholding EPA's determination that Section 316(b) applies to existing facilities. The court of appeals' holding on that point is correct and does not warrant further review.

a. As noted, Section 316(b) requires that "[a]ny standard established pursuant to section [301] of [the CWA] or section [306] of [the CWA] and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. 1326(b). The opening phrase establishes the scope of Section 316(b)'s applicability—*i.e.*, standards developed pursuant to Sections 301 and 306 and applicable to point sources—while the closing phrase establishes its substantive requirement—*i.e.*, that the location, design, construction, and capacity of intake structures reflect BTA. Significantly, while Section 306 addresses only new sources, 33 U.S.C. 1316(b), Section 301 provides for limitations on existing sources, as Entergy concedes (07-588 Pet. 5). See 33 U.S.C. 1311(b). Thus, by mandating that "*[a]ny* standard established pursuant" to Sections 301 or 306 reflect BTA for intake structures, Section 316(b) unambiguously imposes its requirements on both new and existing facilities. 33 U.S.C. 1326(b) (emphasis added).

Entergy argues (07-588 Pet. 15-16) that Section 316(b) is limited to new sources because it imposes requirements on "the location, design, construction, and capacity of cooling water intake structures." 33 U.S.C. 1326(b). As discussed, however, Section 316(b) separately defines its scope by stating that it applies to "[a]ny standard established pursuant to" Sections 301 and 306. *Ibid.*

Even if Section 316(b) does not unambiguously apply to existing facilities, EPA's interpretation is certainly reasonable and entitled to deference. Applying Section 316(b) to existing facilities furthers the CWA's general objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). It also fulfills Section 316(b)'s particular objective of minimizing adverse environmental impacts at facilities that are subject to Section 301 standards. Moreover, EPA has a longstanding and consistent practice of applying Section 316(b) to existing facilities, dating back to its 1977 regulations and a general counsel opinion that same year. See 71 Fed. Reg. at 35,011; *Central Hudson*, Op. EPA Gen. Counsel, NPDES No. 63, 1977 WL 28250, at *6.

b. Entergy nonetheless argues (07-588 Pet. 17-19) that its position is "confirmed by the absence of any CWA mechanism for imposing new requirements relating to the intake of water on existing facilities." As the court of appeals determined, however, EPA may implement Section 316(b) through the NPDES permitting process. 07-589 Pet. App. 68a-70a.

As discussed, Section 316(b) requires that standards established under Sections 301 and 306 must comply with Section 316(b)'s requirements. Section 301 and 306 standards are, in turn, implemented through NPDES

permits. See 33 U.S.C. 1342(a)(1). Indeed, the Act authorizes EPA to "issue [an NPDES] permit for the discharge of any pollutant * * * upon condition that such discharge will meet * * * *all applicable requirements* under sections [301 and 306]." *Ibid.* (emphasis added). Because the Act ties Section 316(b)'s requirements to standards established under Section 301, and the Act further directs that NPDES permits contain all applicable Section 301 requirements, the Act "implicitly requires the Administrator to insure compliance with § 316(b) as one of the permit conditions." *United States Steel Corp.* v. *Train*, 556 F.2d 822, 850 (7th Cir. 1977).

Entergy argues (07-588 Pet. 17-18) that Section 402(a)(1), 33 U.S.C. 1342(a)(1), which authorizes the issuance of NPDES permits, *requires* only that such permits mandate that the "discharge" of a pollutant comply with Section 301 requirements, whereas Section 316(b) governs the intake, as opposed to discharge, of water. But the intake and discharge of water are closely associated with one another, and there is no reason to read Section 402(a)(1) as *precluding* NPDES permits from including all Section 301 requirements. As the court of appeals observed, Entergy's reading cannot be squared with Section 316(b)'s clear application to existing sources. 07-589 Pet. App. 69a-70a. At a bare minimum, EPA's interpretation is reasonable.

c. There is no division among the circuits on the question presented here. Indeed, Entergy does not assert a circuit conflict on the question whether Section 316(b) applies to existing sources; instead, it asserts (07-588 Pet. 18-19) only a circuit conflict on the subsidiary question whether Section 316(b) may be enforced through NPDES permits. There is no such conflict. The District of Columbia Circuit's decision in *NRDC* v. *Uni-*

ted States EPA, 859 F.2d 156 (1988) (cited at 07-588 Pet. 19) does not even involve Section 316(b); instead, it addresses the question whether EPA may include conditions in NPDES permits based on the requirements of an entirely different statute, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See *NRDC*, 859 F.2d at 168-170. As the District of Columbia Circuit explained, NEPA—unlike Section 316(b)—is a "procedural" statute that "does not expand the agency's substantive powers." *Id.* at 169, 170.

Nor is there a conflict with *Virginia Electric & Power Co.* v. *EPA*, 566 F.2d 446 (4th Cir. 1977) (*VEPCO*) (cited at 07-588 Pet. 18-19). *VEPCO* did not involve NPDES permits. Instead, the "sole question" there was whether the district court or the court of appeals had original jurisdiction to review regulations implementing Section 316(b). *VEPCO*, 566 F.2d at 447. That question turned on "whether the regulations constitute 'effluent limitation[s] or other limitation[s]' within the meaning of [33 U.S.C. 1369(b)(1)(E)]." 566 F.2d at 449. It was undisputed that the regulations were not effluent limitations. *Ibid.* The court of appeals held that the regulations were other limitations for purposes of the jurisdictional provision, primarily because "§ 316(b) itself seems to indicate its limitations are to be adopted under §§ 301 and 306." *Id.* at 450. Nothing in *VEPCO*'s analysis, much less its jurisdictional holding, conflicts with the court of appeals' decision in this case; if anything, *VEPCO* supports the court of appeals' determination that Section 316(b)'s requirements are requirements under Sections 301 and 306.

d. Entergy argues (07-588 Pet. 22-25) that the court of appeals' decision implicates a circuit conflict on whether courts must defer to an agency's reasonable inter-

pretation of its own statutory jurisdiction. That question is not properly presented here, for at least two reasons. First, it was not timely raised or considered below. Entergy raised that contention for the first time in its reply brief in the court of appeals, and therefore has forfeited it. See, *e.g.*, *United States* v. *Gabriel*, 125 F.3d 89, 100 n.6 (2d Cir. 1997). Nor did the court of appeals address the question. Thus, the question is not properly presented here. See, *e.g.*, *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1208 (2007).[2]

Moreover, the court of appeals had an even more fundamental reason for not addressing the question: the court held that Section 316(b) "plainly applies" "on its face * * * to existing facilities." 07-589 Pet. App. 68a, 70a; see *id.* at 69a (emphasizing the "clear textual basis" for that conclusion). Because the court of appeals held that the statute is unambiguous, it had no occasion to analyze the deference that would be due to EPA's reasonable construction of an ambiguous statute. To be sure, the court of appeals stated, apparently as an alternative holding, that "at the very least, the EPA permissibly interpreted the statute to cover existing facilities." *Id.* at 65a; see *id.* at 68a. But the court's analysis rested on the plain language of the statute, see *id.* at 67a-68a, and, as discussed above, the court concluded that the text is "clear" and "plain[]." *Id.* at 69a, 70a. Thus, the court's holding does not appear to rely on deference.

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[2] In a string-cite for the general proposition that agencies' interpretations must be reasonable, Entergy's opening brief in the court of appeals included a parenthetical that said, "discretion inappropriate regarding matters of agency authority." Entergy C.A. Br. 33. That brief statement in a parenthetical to a case cited for a different proposition did not adequately raise the issue.

Even if the basis for the court's holding were unclear, that lack of clarity would make this case a poor vehicle for considering the deference question.

In any event, under *Chevron*, EPA's reasonable interpretation of the statutes it administers is entitled to deference, even if those statutes are considered jurisdictional. Indeed, an agency's construction of statutory provisions it is charged with administering normally affects the scope of the agency's regulatory authority and responsibilities. As a result, Entergy's position would all but eviscerate *Chevron*. In *Chevron* itself, this Court deferred to EPA's interpretation of the Clean Air Act's statutory term "stationary source"—an interpretation that determined the scope of EPA's regulatory responsibilities and authority. See *Chevron*, 467 U.S. at 839-840. Entergy makes no attempt to explain how its position can be squared with *Chevron*, and it cannot. Indeed, just three months before this Court decided *Chevron*, it held that an agency was entitled to deference on the scope of its jurisdiction and authority. *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984). Since then, this Court has never held otherwise.

Entergy argues (07-588 Pet. 24-25) that two courts of appeals have nonetheless held that an agency's view of its own jurisdiction is not entitled to deference. Those cases are distinguishable. *Holderfield* v. *MSPB*, 326 F.3d 1207, 1208 (Fed. Cir. 2003), involved the Merit Systems Protection Board's (MSPB's) interpretation of the statutes that, quite literally, determine the scope of its adjudicatory jurisdiction. *Holderfeld* is distinguishable not only because it involves adjudicatory jurisdiction as opposed to regulatory authority, but also because the Federal Circuit reviews most of the MSPB's legal determinations *de novo*, not only its jurisdictional ones. See,

e.g., *King* v. *Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997). Moreover, the Federal Circuit *does* defer to MSPB regulatory (as opposed to adjudicatory) interpretations of its jurisdiction. See *Garcia* v. *DHS*, 437 F.3d 1322, 1338 (2006) (en banc).

Petitioner is correct (07-588 Pet. 24-25) that, in the context of a different statute, the Seventh Circuit has declined to defer to an agency's interpretation of the scope of its regulatory authority. *Northern Ill. Steel Supply Co.* v. *Secretary of Labor*, 294 F.3d 844, 846-847 (2002). That case did not, however, involve Section 316(b) (or the CWA more generally). In any event, as discussed above, this case does not properly present the question, and the Seventh Circuit's decision is clearly wrong.

e. Finally, Entergy's prediction (07-588 Pet. 20-21) that the court of appeals' decision will have calamitous consequences is premature and is not supported by the record. Indeed, Entergy points (*id.* at 20) only to the cost of retrofitting nuclear facilities—which comprise a small percentage of the relevant facilities—with closed-cycle cooling towers. As discussed, however, the court of appeals' decision does not necessarily require that result on remand. Thus, while Entergy's arguments underscore the importance of the cost-benefit issue, they do not justify further review of the court of appeals' holding that Section 316(b)'s requirements apply to both new and existing facilities.

CONCLUSION

Although the decision below is incorrect in important respects, and has great potential practical importance, and the government would support reversal in the event that certiorari were granted, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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